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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 63

STEELE'S MILLS, A CORPORATION, AND WACHOVIA BANK & TRUST COMPANY, AS TRUSTEE,

Petitioners,

vs.

CHARLES H. ROBERTSON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF NORTH CAROLINA

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF OPPOSING THE GRANTING OF THE WRIT OF CERTIORARI.

I

Conflict Not Removed by Second Opinion in Lincoln Electric Company Case

The brief of the respondent treats the latest decision of the Court of Appeals for the Sixth Circuit in *Commissioner* v. *Lincoln Electric Company,* decided August 29th, 1949, C. C. H. Par. 9388, as receding from the decision of the same court on the prior appeal in that case to the effect that the payment to the employees benefit fund was, in nature and character, an ordinary and necessary expense within the meaning of Section 23(a) of the Internal Revenue Code. A reading of the opinion completely refutes this argument.

The Court expressly adhered to its prior opinion to the effect that the expenditure was, in nature and character, an ordinary and necessary expense. The Court further held, however, that an additional factual question, not theretofore decided in that case by the tax court, was presented, to-wit: the reasonableness of the amount of the expenditure. While the soundness of that conclusion may be questioned, it is pointed out that, in the instant case, the additional question of fact has, in effect, already been passed upon by the District Court, the fact finding tribunal in this case. See Finding of Fact No. 15, Record page 23.

The decision of the Court of Appeals for the Sixth Circuit in the Lincoln Electric Company case on both appeals is squarely to the effect that the expenditure in question is, in nature and character, an ordinary and necessary expense within the meaning of Section 23(a). The decision of the Court of Appeals for the Fourth Circuit in this case is squarely to the effect that a like expenditure is not, in nature and character, an ordinary and necessary expense within the meaning of Section 23(a) of the Internal Revenue Code. Thus there is a clear-cut conflict between the decision of the two courts as is recognized by the Court of Appeals for the Fourth Circuit in this case, *Robertson, Collector,* v. *Steele's Mills, et al.,* 172 F. (2) 817, with respect to the first Lincoln Electric decision, *Lincoln Electric Company* v. *Commissioner,* 162 F. (2) 379.

II

Application of Section 23(p)

On page 13 of Respondent's Brief is an argument to the effect that the 1942 amendments to Section 23(p) and related sections, preclude the application of Section 23(a) to payments of the nature here involved for tax years subsequent to 1941. This is by no means certain. It would depend on whether the payments were under a "stock bonus,

pension, profit-sharing, or annuity plan," or were deferred compensation. If they fall in none of these categories, Sec. 23(p) as amended in 1942 would not be applicable. This is a question of construction which may well arise but does not arise in this case because the year involved here is 1941. It is of interest that the case of *Roberts Filter Manufacturing Company* v. *Commissioner*, 174 F. (2) 79 (C. A. 3rd) also involved the tax year 1941. The Respondent's argument that it is the 1942 amendment which precludes the application of Sec. 23(a) to cases of this kind and Respondent's failure to place any reliance on Sec. 23(p), up to this time, in this case seem to indicate that the Respondent is not in agreement with reliance on Sec. 23(p) in the *Roberts Filter* case involving 1941.

It is submitted that this case, the *Lincoln Electric* case, and the *Roberts Filter* case show a conflict between the Courts of Appeal the importance of which is not minimized by the 1942 amendments to the Internal Revenue Code, but that those amendments merely present an additional question of statutory construction.

Conclusion

Petitioners' position with respect to Respondent's remaining arguments is sufficiently indicated in the Petition and Brief filed therewith. Based thereon, Petitioners earnestly solicit the granting of the Writ of Certiorari.

Respectfully submitted,

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